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Marlene H. Dortch
Secretary
Federal Communications Commission
445 12th Street, SW
Washington, DC 20554

Re: *Implementation of Section 224 of the Act,* WC Docket 07-245; *A National Broadband Plan for Our Future,* GN Docket No. 09-51

Dear Ms. Dortch:

I met separately on March 28th with Margaret McCarthy (Office of Commissioner Michael Copps), Angela Kronenberg (Office of Commissioner Mignon Clyburn), and Christine Kurth (Office of Commissioner Robert McDowell), and on March 29th with Brad Gillen (Office of Commissioner Meredith Attwell Baker), regarding pole attachment regulation. On March 29th I also discussed pole attachment regulation via phone with Marcus Mayer (Wireline Competition Bureau) and, joined by Kimberly Bennett (Windstream), with Christi Shewman, William Dever, and Jeremy Miller (all of the Wireline Competition Bureau). All of these conversations were consistent with the text below and attached.

1. A Uniform Broadband Pole Attachment Rate Formula Should Apply Clearly and Consistently Across *All* Broadband Providers.

The Federal Communications Commission ("Commission") should adopt a pole attachment rate formula that applies in the same manner to all future pole attachment rate negotiations between investor-owned electric companies ("ELCOs") and broadband providers (incumbent local exchange carriers ("ILECs"), competitive local exchange carriers ("CLECs"), and cable operators alike). This pole attachment rate formula should be used to establish presumptively just and reasonable rental rates. Parties, however, should be permitted to rebut the presumption of appropriate pole attachment rates with a showing that establishes that the agreement in question includes terms and conditions outside of industry norms – a showing that could be made by a pole owner or an attacher.

If the FCC adopts a rate formula that significantly reduces CLEC rental fees but does not provide the same relief to ILECs, ELCO price gauging of ILECs likely will only get worse as ELCOs' pole attachment personnel will attempt to "make up" for lost revenues on the CLEC front with aggressive renegotiations of agreements with ILECs. This result would

be contrary to the goals and recommendations in the Commission's National Broadband Plan.[1] Specifically, while the Plan sought to increase broadband deployment in rural areas, a regime that does not meaningfully protect ILECs against ELCOs' rate increases will lead to higher costs for deploying fiber back-haul and last-mile broadband networks in already high-cost areas – costs that will discourage further deployment of wireline and wireless broadband operations (given wireless providers often rely on entities, such as Windstream, to deploy fiber backhaul for their services).[2] Moreover, fair competition for future universal service support will be undermined if pole attachment rules give ILECs' competitors a special cost advantage when they compete for high-cost support for broadband deployment projects.

Joint use arrangements do not obviate the need for ILEC rate protections. The mere fact of pole ownership does not mean an ILEC possesses meaningful leverage in negotiations. Windstream now owns far fewer poles than ELCOs: In its joint use agreements with ELCOs, the ELCOs now own 88 percent of the poles, while Windstream owns just 12 percent of poles. This imbalance in pole ownership has allowed ELCOs to claim significantly enhanced bargaining power in pole attachment negotiations. A sign of this imbalance, virtually all major renegotiations of Windstream's joint use arrangements have been triggered by ELCOs seeking higher rates. Windstream, under many joint use arrangements, now is required to pay for approximately 40 percent of the pole costs, even though it typically only uses one or two feet of pole space, equivalent to just 7.4 percent or 14.8 percent of the usable space.

In addition, joint use arrangements typically do not offer meaningful, non-rental-rate benefits that put ILECs "ahead" of cable and CLECs. Indeed, other terms and conditions of these arrangements may entail more burdens than benefits. For example, although there may be benefits of ILECs' receiving some free make-ready construction under a joint use agreement, ILECs may have corresponding obligations to provide free make-ready work to the ELCOs – obligations that offset benefits, or actually produce a net burden on the ILECs.

2. A "Large Job" Exception Should Not Be Allowed to Swallow the General Rule's Requirement for Timely Make-Ready Work.

Windstream strongly supports the Commission's intent to develop a make-ready timeline for broadband deployment projects. Rules are needed to ensure pole owners respond to pole attachment requests in a timely manner. Otherwise unduly delayed pole access will impede the deployment of both wired and wireless broadband.[3]

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[1] As observed by the National Broadband Plan, the Commission will "support the goal of broadband deployment" if it ensures that "rates for pole attachments should be as low and as close to uniform as possible." National Broadband Plan at 128.

[2] The special importance of ILECs to rural broadband deployment is evidenced by recent experience with stimulus funding. Over the next two years Windstream will spend $241.7 million ($60.4 million of its own money to complement $181.3 million in broadband stimulus grants) to deploy broadband in high-cost areas in 13 states. In contrast, most major cable companies and CLECs did not even apply for stimulus funds.

[3] As previously noted, fiber deployments support cellular backhaul, as well as wireline services.

The Commission should avoid specifying a number of poles that would set a low *ceiling* for what constitutes a "large job." An example of this troublesome approach is offered by Verizon, which recommends that the Commission not apply the make-ready timeline when a company receives applications from a single provider totaling more than 200 poles in a given 30-day period.[4] Verizon claims that this standard merely would ensure that timelines do not apply "where the utility receives applications to make attachments to a large number of poles in a short period of time."[5] But, in practice, this proposal would create a far-reaching exception – whereby requests addressing a combined total of *less than six miles* across a Bell Operating Company's service territory may not be subject to the timeline.

Windstream also urges the Commission to avoid adopting a "large job" exception whereby the agency would refrain from applying the timeline to any instance where a pole owner receives applications within a 30-day period to attach to more than one-half of one percent of the owner's poles in a particular state. Adoption of this proposal would mean that many small- and medium-sized broadband deployment projects would not be subject to the make-ready timeline. As applied to Windstream's pole inventory, for example, the one-half of one percent threshold would mean that in one state in which we operate a request to attach to just 6 poles would qualify as a "large job," while in another state a request to attach to 14 poles would qualify. Certainly, in practice, that threshold would not capture the Commission's intention to create an exception for *large* jobs.

Under no circumstances should a "large job" be deemed to include requests to attach to *less than 350* of an owner's poles in a state during a single calendar month. This 350 poles *floor* on what constitutes a large job is grounded in norms recognized by the National Broadband Plan: The Plan found that it was reasonable to assume 35 poles per mile.[6] Accordingly, under this standard, any job addressing less than 10 miles (350 poles) would not qualify as a large job – a reasonable, minimum threshold for pole owners of all sizes.

The Commission would be best served by incorporating this 350-poles threshold into a sliding scale, rather than using this threshold to demark jobs that are altogether exempt from the make-ready timeline. Specifically the Commission should employ a sliding scale with requests for: (a) 350 poles or less subject to the timeline; (b) 351-1,000 poles allotted 30 additional days (divided between the estimate and construction steps); and (c) more than 1,000 poles allotted 60 additional days (divided between estimate and construction). This scale would offer rational guidance that would allow attachers to determine for themselves whether a job will receive protections afforded by the make-ready timeline.

Adoption of these "large job" accommodations would not impose unreasonable burdens on pole owners. Speaking from its experience as a pole owner, Windstream, when faced with a request for a large number of pole attachments, hires additional crews/contractors and/or pays overtime. Windstream's proposal would allot additional time to pole owners that

[4] Letter from Ann D. Berkowitz, Director – Federal Regulatory Affairs, to Marlene Dortch, Secretary, FCC, WC Docket No. 07-245, GN Docket No. 09-51 (filed Mar. 25, 2011).

[5] *Id*.

[6] National Broadband Plan at 128, n.7.

may need extra time to put out a bid for contractors and/or reallocate internal resources. Furthermore, speaking from its experience as an attacher, Windstream can attest that to the fact that attachers are willing to assume additional expenses required to expedite projects.

3. The Commission Should Clarify that Any Penalties for Unauthorized Attachments Do Not Apply to Grounding Connections.

If new penalties for unauthorized attachments are adopted, the Commission should clarify that those attachments do not include grounding connections, pedestals, or any other apparatus located in close proximity to a pole. Disputes over these items can arise when a broadband provider, such as Windstream, has a pedestal located several feet away from an ELCO pole. To prevent electrocution, Windstream connects the grounding wire from its pedestal to the grounding wire coming off the bottom of the pole. Sometimes these grounding connections are underground; other times they occur on the ground or at the very bottom of the pole – outside of the usable space on the pole.

Attempting to further increase revenues from ILECs, some ELCOs have tried to count each of these connections as an attachment and then assess an annual rental rate for such connections. These unauthorized attachment claims are meritless. First, as noted above, the connections are not within the usable space. Second, these connections do not require rearrangement in the case of make-ready work for other attachers. Finally, these connections do not meaningfully contribute to wear and tear on a pole, or result in new requirements for annual maintenance (e.g., for tree trimming).

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Please feel free to contact me if you require any additional information.

Sincerely,

/s/

Jennie B. Chandra

Attachment

cc: Zac Katz
Margaret McCarthy
Angela Kronenberg
Christine Kurth
Brad Gillen
Marcus Maher
Christi Shewman
William Dever
Jeremy Miller
Alex Starr